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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE CITY OF CHICAGO,
Petitioner,
v.
JAMES M. ALEX, *et al.*,
Respondents.

THE CITY OF CHICAGO,
Petitioner,
v.
MICHAEL M. MCKITTRICK, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether paramedics employed by an organized fire department fall within the partial exemption from the Fair Labor Standards Act's overtime pay requirements for employees of a public agency engaged in "fire protection activities."

PARTIES TO THE PROCEEDING

The petitioner in both *City of Chicago v. Alex, et al.* and *City of Chicago v. McKittrick, et al.* is the City of Chicago. The respondents are listed in the appendix. App., *infra*, at 42a-50a.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the City of Chicago, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, at 1a-17a, is reported at 29 F.3d 1235 (7th Cir. 1994). The district court's opinion, App., *infra*, at 20a-35a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

29 U.S.C. § 207(k):

> *Employment by public agency engaged in fire protection or law enforcement activities.*
>
> No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—
>
> > (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or
> >
> > (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days;
>
> compensation at a rate not less than one and one-half times the regular rate at which he is employed.

29 C.F.R. § 553.210 (1993) (in pertinent part):

(a) As used in section[] 7(k) . . . of the Act, the term "any employee . . . in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. . . . The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See § 553.215.

29 C.F.R. § 553.211 (1993) (in pertinent part):

(a) As used in section[] 7(k) . . . of the Act, the term "any employee . . . in law enforcement activities" refers to any employee (1) who is a uniformed or plainclothed member of a body of officers and subordinates who are empowered by State statute or local ordinance to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes, (2) who has the power to arrest, and (3) who is presently undergoing or has undergone or will undergo on the job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics.

(b) Employees who meet these tests are considered to be engaged in law enforcement activities regardless of their rank, or of their status as "trainee,"

"probationary," or "permanent," and regardless of their assignment to duties incidental to the performance of their law enforcement activities such as equipment maintenance, and lecturing, or to support activities of the type described in paragraph (g) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's law enforcement activities. See § 553.215.

29 C.F.R. § 553.215 (1993) (in pertinent part):

(a) ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection activities or law enforcement activities of the type contemplated by section[] 7(k) . . . if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. . . .

(c) Ambulance and rescue service employees of private organizations do not come within the section 7(k) . . . exemption even if their activities are substantially related to the fire protection and law enforcement activities performed by a public agency or their employer is under contract with a public agency to provide such services.

STATEMENT

1. *Background.* The City of Chicago provides emergency medical services to the people of the City at all hours of the day and night. To do so, it employs para-

medics whose basic duties are to provide emergency medical care, life support, and transportation to hospitals for people who are injured or ill. The paramedics are employees of the Chicago Fire Department and are stationed along with firefighters in fire stations. They are members of the same collective bargaining unit as Chicago firefighters and their terms of employment are governed by the same collective bargaining agreement that covers the firefighters. They are on the same pay scale as the firefighters and receive the same benefits.

Like the firefighters, the paramedics work a platoon schedule defined in the collective bargaining agreement. Normal tours of duty consist of 24 consecutive hours on duty, followed by 48 consecutive hours off duty, with every fifth scheduled work day as an off-duty day. The collective bargaining agreement between the City and the union that represents the paramedics provides that "[e]mployees authorized to work any time on duty in addition to normal shifts . . . shall be considered as working overtime hours, subject to the overtime rate provision of this Agreement." *McKittrick* R. 84, Exhs. at 283. As prescribed by the Fair Labor Standards Act ("FLSA"), the overtime rate of pay is one and one-half times the regular rate of pay.

For most employees, Section 7(a) of the FLSA requires overtime pay for hours worked in excess of 40 per week. 29 U.S.C. § 207(a). In 1974, Congress added Section 7(k) to the FLSA, allowing public agencies engaged in "fire protection" or "law enforcement" activities a partial exemption from the overtime obligations set forth in Section 7(a).[1] Congress enacted this exemption

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[1] Although this Court held in 1976 that application of the FLSA to state and local governments in areas of traditional governmental function was unconstitutional, see *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976), it later overturned that holding in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

"in recognition of the special needs of governments in the area of public safety and the unusually long hours public safety employees must spend on duty." S. Rep. No. 159, 99th Cong., 1st Sess. 5 (1985), reprinted in 1985 U.S.C.C.A.N. 651, 653. The partial exemption allows state and local governments to depart from the conventional 40-hour per week schedule in overtime hours for fire and police employees. Section 7(k) provides:

> *Employment by public agency engaged in fire protection or law enforcement activities.*
>
> No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—
>
> > (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods or 28 consecutive days in calendar year 1975; or
> >
> > (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days;
>
> compensation at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(k).

The City of Chicago has elected an 18-day work period for its firefighters and paramedics. Applying the ratio set out in Section 7(k), overtime pay is required for employees who work more than 136 hours in 18 days. Under the platoon schedule in effect in the Chicago Fire Department, firefighters and paramedics are scheduled to work a maximum of five 24-hour tours of duty during any 18-day cycle, for a maximum total of 120 hours.

The Department of Labor ("DOL") has issued three regulations pertinent to the Section 7(k) exemption for employees in fire protection and law enforcement activities as applied to paramedics. The first relates to employees of an organized fire department and provides in part:

> (a) As used in section[] 7(k) . . . of the Act, the term "any employee . . . in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. . . . The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities.

29 C.F.R. § 553.210 (1993). The second relates to employees of a police department, and tracks Subsection .210, placing these paramedics within the partial exemption if they are an integral part of the department's law enforcement activities. See *id.* § 553.211. The third regulation relates to ambulance and rescue service employees not employed by state or local fire and police departments, and provides in pertinent part:

> (a) ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection activities or law enforcement activities of the type contemplated by section[] 7(k) . . . if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. . . .
>
> (c) Ambulance and rescue service employees of private organizations do not come within the section 7(k) . . . exemption even if their activities are substantially related to the fire protection and law enforcement activities performed by a public agency or their employer is under contract with a public agency to provide such services.

29 C.F.R. § 553.215 (1993).

2. *The Proceedings Below.* The plaintiffs in these two consolidated cases are current and former paramedic employees of the Chicago Fire Department's Bureau of Emergency Medical Services. They filed complaints making identical claims, based upon the FLSA, seeking overtime compensation at the rate of not less than one and one-half times their regular rate of pay for all hours of work in excess of 40 hours per week.[2] The *McKittrick* plaintiffs

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[2] In a second claim, the plaintiffs claimed that in the event that they were determined to be within the exemption set forth in Section 7(k) of the FLSA, they should be considered employees in law enforcement activities, rather than employees in fire protection activities. This claim reflects the lower overtime threshold for employees in law enforcement than for employees in fire protection activities. Under the FLSA, the City pays its police officers compensation for hours worked in excess of 43 hours in a seven-day

filed a motion for partial summary judgment on the issue of liability on their claim to overtime for all hours over 40 per week, arguing that they do not fall within the Section 7(k) exemption. The City filed a cross-motion for summary judgment, arguing that the plaintiffs are entitled to overtime pay only in accordance with the exemption in Section 7(k) for employees in fire protection activities.

The district court granted the plaintiffs summary judgment as to liability on their first claim. App., *infra*, at 34a. The district court applied the DOL regulations to determine whether Chicago paramedics fell within the Section 7(k) exemption. App., *infra*, at 30a-31a. The district court concluded that under Section 553.210 of the regulations, paramedics may be considered employees in fire protection activities if they form "an integral part of the public agency's fire protection activities." 29 C.F.R. § 553.210(a). See App., *infra*, at 32a. The court noted that the regulations do not define the phrase "integral part." *Ibid.* The court also noted that Section 553.210(a) included a cross-reference to Section 553.215 of the regulations, but that the latter section was, on its face, applicable only to "employees of a public agency other than a fire protection . . . agency." 29 C.F.R. § 553.215(a). App., *infra*, at 32a. Although the district court did not determine the meaning of "integral part," it did conclude that it was a more stringent standard than the two-part "substantially related" test set forth in Subsection .215. *Ibid.* The court then determined that Chicago paramedics did not meet the two-part "substantially related" test, and accordingly held that they could not meet the more stringent "integral part" test. *Id.* at 34a.

The parties then reached an agreement on the method for calculating damages both in *McKittrick* and *Alex*. Stipulations were filed with the district court, settling all

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work period or in excess of 171 hours in a maximum 28-day work period.

the remaining issues. The district court then granted the *Alex* plaintiffs summary judgment based on the prior memorandum opinion in *McKittrick*. The court entered a final judgment in favor of the plaintiffs in both cases. App., *infra*, at 36a, 39a.

The court of appeals affirmed the district court's judgment, but analyzed the regulations differently. The court of appeals acknowledged that "courts are split" on the issue whether the "integral part" test of Subsection .210 of the DOL regulations is a separate test that applies to employees of an organized fire department. App., *infra*, at 10a. The court held that it was not, and that only one test—the "substantially related" test set out in Subsection .215 of the regulations—determined the FLSA status of all paramedics, regardless of whether they are employed within an organized fire department or by a public agency other than a fire department. *Ibid.* The court acknowledged that Subsection .215(a) "clearly purports to lay out a test only for public agencies other than fire departments," but held that Subsection .210 did not unambiguously state that the integral part test is a contrasting test for employees of fire departments. App., *infra*, at 10a-11a. It also determined that the cross-reference to Subsection .215 at the end of Subsection .210 "most likely indicates that [Subsection .215] is the appropriate test to apply to ambulance personnel from any public agency." App., *infra*, at 11a.

The court of appeals then applied the "substantially related" test to Chicago paramedics. The court reached only the first prong of the test—the requirement that the ambulance and rescue service employees receive training in the rescue of fire, crime, and accident victims—and concluded that Chicago paramedics did not meet this requirement because they are not trained to extricate victims "from physical entanglement or other environmental danger." App., *infra*, at 16a. The court thus held that Chicago paramedics do not fall within the Section 7(k) exemption.

REASONS FOR GRANTING THE PETITION

1. In an effort to construe the Section 7(k) exemption in the FLSA governing employees in fire protection and law enforcement activities, the Department of Labor has issued three regulations pertinent to the question when paramedics (or other emergency medical service employees) fall within the exemption. See 29 C.F.R. §§ 553.210, 553.211, 553.215 (1993). Even so, courts are split on what the test is for determining whether paramedics employed by a fire or police department are employees covered by the partial exemption. Some courts have concluded that the statute, as construed by the regulations, sets out two tests, one applicable to paramedics employed by a fire or police department and requiring only that paramedics be an "integral part" of the department's fire protection or law enforcement activities, and another, more rigorous test applicable to paramedics employed by a public agency other than a fire or police department requiring that the services of paramedics be "substantially related" to firefighting or law enforcement. See *Wouters v. Martin County*, 9 F.3d 924, 931 (11th Cir. 1993) ("integral part test presents an inquiry distinct from the substantially related standard"), cert. denied, No. 93-1867 (Oct. 3, 1994); *Alexander v. Kansas City*, 1993 WL 393013, *6 (D. Kan. Sept. 23, 1993) (same). Others have concluded that there is only one test—the "substantially related" test—applicable to all publicly employed paramedics. See *Alex v. City of Chicago*, App., *infra*, at 10a (two-part substantially related test in Subsection .215 defines the Subsection .210 test that applies to paramedics employed by a fire department); *Justice v. Metropolitan Government*, 4 F.3d 1387, 1395 (6th Cir. 1993) (same); *Bond v. City of Jackson*, 939 F.2d 285, 287 (5th Cir. 1991) (applying the substantially related test to paramedics employed by a fire department without discussion).[3] Indeed, the court below acknowl-

[3] Although these cases all involved paramedics employed by a fire department, the decisions reached by the courts would apply

edged that there is a conflict in the circuits on this issue. See App., *infra*, at 10a.

These differing interpretations have thrown a settled system into chaos. State and local governments across the country have relied on Sections 553.210 and 553.211 in organizing their fire and police departments and training their emergency personnel. These governments, like the City of Chicago, have integrated paramedics into fire or police departments but have neither cross-trained paramedics nor required them to enter burning buildings, make arrests, or otherwise engage in activities "substantially related" to firefighting or law enforcement. As a result of the decision below, and similar ones from the Fifth and Sixth Circuits, governments in circuits that have not decided this issue do not know whether they can continue to rely upon the "integral part" test. Instead, they may not be able to classify their paramedics as employees in fire protection or law enforcement activities for purposes of overtime pay unless those paramedics satisfy the more rigorous "substantially related" test, which requires that a paramedic's duties be substantially related to firefighting or law enforcement and which was interpreted by the district court in this case to require paramedics to actually enter burning buildings or extricate people trapped in burning automobiles. See App., *infra*, at 33a. This Court should resolve this conflict so that state and local governments can determine whether their ambulance and rescue service employees who are employed by an organized fire or police department fall within the Section 7(k) exemption to FLSA overtime requirements for employees in fire protection and law enforcement activities.

2. Determining what test applies to paramedics employed by a fire or police department is a matter of great

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equally to paramedics employed by a police department, since the regulations for paramedics employed by a fire department and paramedics employed by a police department contain parallel language. See 29 C.F.R. §§ 553.210, 553.211.

financial and operational importance to state and local governments throughout the country. Units of government that employ paramedics or other emergency medical service workers must set work schedules for these employees that allow them to cover medical emergencies that occur around the clock. In this respect, paramedics are no different from firefighters or police officers, who must also respond to emergencies around the clock, and who, for just this reason, were partially exempted from the FLSA by the enactment of Section 7(k). Emergency work—whether by firefighters and police officers or paramedics—does not fit comfortably within the 40-hour framework of the FLSA because medical emergencies, like fire and police emergencies, occur at all hours. For this reason, DOL expressly recognized that rescue and ambulance service personnel employed by public agencies fall within the Section 7(k) exemption.

State and local governments nationwide have integrated their paramedics into their fire or police departments in reliance upon Sections 553.210 and 553.211 of the regulations, scheduling their paramedics to work more than 40 hours per week and paying overtime in accordance with Section 7(k). Now, as a result of the decisions holding that the integral part test has no independent significance and that only paramedics whose jobs are substantially related to firefighting or law enforcement are within Section 7(k), these state and local governments face immense financial exposure and organizational upheaval. We estimate that our own exposure in this case alone exceeds $20 million. With financial consequences of this magnitude, state and local governments now inevitably confront great pressure to restructure their fire and police departments, even in circuits yet to decide the question. Unless governments hire more paramedics so that shift schedules can be rearranged to a 40-hour per week schedule, they will face the possibility of liability for a huge amount of backpay, as well as liability for overtime pay in the future. At a minimum, state and local governments

face litigation that will be both expensive in and of itself, and risky, given the reported decisions. Thus, the financial stakes mean that the Seventh Circuit's decision here, if left unreviewed, will have national impact.

Absent review of this issue, the decision below will also affect the operation of government at its most basic level —the provision of fire and police services to the community. Section 7(k) was intended to minimize the impact of FLSA on the cost of providing these essential services. Yet the case for using unconventional shift structures for paramedics—who also provide emergency services—is the same as for firefighters and police officers, especially when the paramedics are integrated into fire and police departments. State and local governments could avoid costly and intrusive restructuring of their emergency services if this Court reviews this issue at this time.

3. The Seventh Circuit's conclusion that the "substantially related" test of Section 553.215 is the sole test "to apply to ambulance personnel from any public agency," App., *infra*, at 11a, ignores the plain language of the DOL regulations, which sets out three distinct categories of rescue and ambulance service personnel. Sections 553.210 and 553.211 relate to employees who are employed by a fire or police department. Section 553.215(a) relates to "employees of a public agency other than a fire protection or law enforcement agency." Section 553.215 (c) applies to ambulance and rescue service employees of private organizations.

The regulations also set out different requirements for each of these categories of employees in order to fall within the Section 7(k) partial exception from the FLSA. Under Subsections .210 and .211, paramedics employed by a fire or police department fall within the exemption if they "form an integral part" of the public agency's fire protection or law enforcement activities. Under Subsection .215(a), ambulance and rescue service employees em-

ployed by a public agency other than an organized fire department or law enforcement department fall within the exemption if their services are "substantially related" to firefighting or law enforcement activities as defined in that subsection. And under Subsection .215(c), ambulance and rescue service employees of private organizations do not come within the Section 7(k) exemption regardless of the nature of their activities. A DOL, Wage and Hour Division, letter ruling confirms that there are two tests applicable to paramedics employed by a public agency and that privately employed paramedics do not fall within the exemption. That letter ruling explains that paramedics employed by a fire or police department, and stationed at a fire or police station, are within the Section 7(k) exemption if they form an integral part of the public agency's activities; that a different standard, the "substantially related" standard set out in Section 553.215(a), applies to paramedic employees of a public agency other than a fire or police department; and that the exemption does not apply at all to paramedics employed by private organizations. Adm. Ltr. Rul. (May 7, 1993), *reprinted in Fair Labor Standards Handbook*, App. III at 339 (April 1994). Logic and the structure of the regulations demonstrate that the tests in the regulations are set forth in increasing order of difficulty in qualifying for the exemption. First, it is easier for a public employer to show that a paramedic actually employed by a fire or police department is exempt as an employee in fire protection or law enforcement activities; second, it is more difficult for a public employer to show that a paramedic not employed by a fire or police department is exempt; and finally, it is impossible for a private employer to show that its paramedics are exempt.[4]

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[4] Although the district court concluded that the "substantially related" test and the "integral part" test were not the same, it reached the wrong result because it incorrectly decided that the "integral part" test for employees of a fire or police department was more, not less, stringent than the test for employees of a

The Seventh Circuit has reduced these three categories and tests to two—ambulance and rescue service employees who work for a public agency are governed by a "substantially related" test, and those who work for private organizations are never within Section 7(k). Collapsing the two different categories of paramedics employed by public agencies—those employed by a fire or police department and those employed by other public agencies—ignores the plain language of the regulations identifying the two different types of employees and prescribing different tests for each. If the test were the same for each, there would be no reason for DOL to adopt different regulations using different tests. Indeed, the first sentence of Section 553.215(a) announces in the plainest terms that the test set out in that section, the "substantially related" test, applies to "[a]mbulance and rescue service employees of a public agency *other than a fire protection or law enforcement agency*." 29 C.F.R. § 553.215(a) (emphasis added). Nevertheless, the Seventh Circuit has held that this test also applies to the employees of an organized fire or police department explicitly covered by the "integral part" test in Sections 553.210 and 553.211. The result of this analysis is something that the regulations plainly do not contemplate—to apply the "substantially related" test to paramedics employed by a fire protection or law enforcement agency.

The Seventh Circuit gives far too much weight to an unexplained cross-reference at the end of Sections 553.210 and 553.211 at the expense of the plain language of the regulations. After setting forth the category of employees to whom each of these sections applies—employees of fire and police departments—and the test that governs their FLSA status—whether they form an integral part

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public agency other than a fire or police department. It defies logic to conclude that DOL regulations would make it more difficult for paramedics who actually are employed by a fire or police department to be considered employees in fire protection or law enforcement activities than paramedics who are not employed by a fire or police department.

of the agency's fire protection or law enforcement activities—Sections 553.210 and 553.211 conclude: "See § 553.215." The Seventh Circuit concluded that this cross-reference directed the reader to Subsection .215 for the "appropriate test to apply to ambulance personnel from any public agency." App., *infra*, at 11a. As its excuse for attributing substantive meaning to the cross-reference and ignoring the substantive meaning of the rest of the text of Sections 553.210, 553.211, and 553.215, the court said only that "inartful draftsmanship should not be misidentified as calculated complexity." App., *infra*, at 11a-12a. Thus, the court casually dismissed the entire structure and import of the regulations.

It defies reason to think that the mere, unexplained cross-reference was intended to have such drastic effect as turning two different tests and regulations into one. The cross-reference was, no doubt, simply designed to refer the reader to a related section that also applies to other types of ambulance and rescue service employees. See *Nalley v. Mayor and City Council of Baltimore*, 796 F. Supp. 194, 198 (D. Md. 1992). And even if its meaning cannot confidently be predicted, the meaning of the plain language of these sections containing an "integral part" test, not a "substantially related" test, is clear and should have prevailed. Instead, the Seventh Circuit has turned the "integral part" concept found in Sections 553.210 and 553.211 into surplusage. In the Seventh Circuit's view, the "integral part" test governs nothing.

By applying the wrong test, the Seventh Circuit reached the wrong result. Chicago's paramedics are an integral part of the Chicago Fire Department's fire protection activities. Indeed, their employment is completely integrated into the Chicago Fire Department: they are employed by the Fire Department; they work in fire stations along with firefighters; they belong to the same collective bargaining unit as the firefighters; they are covered by the same collective bargaining agreement as the firefighters; they are on the same pay scale as firefighters;

they receive the same benefits as the firefighters; and they belong to the same pension fund as the firefighters. They also perform work without which the Fire Department could not succeed in its mission. Chicago paramedics provide emergency medical service and life support for victims of fires and accidents. That is surely an "integral part" of the "fire protection activities" of the Chicago Fire Department. Even the Seventh Circuit recognized that "[r]apidly reacting medical teams performing first-line treatment and triage duties at fire scenes are responding to the very immediate and direct consequences of a fire. Such activities, in a not overly broad sense, protect people from the dangers of fire." App., *infra,* at 7a. The Chicago Fire Department has not completed the task of protecting individuals from fires until it has provided the emergency medical and life support services necessary to save lives. Therefore, those services, provided by paramedics, are an integral part of the Fire Department's fire protection activities.

In sum, there is a conflict among courts that have interpreted the DOL regulations governing the circumstances under which paramedics can be considered employees in fire protection or law enforcement activities under Section 7(k) of the FLSA. Local governments that have relied upon the "integral part" language of Sections 553.210 and 553.211 of the regulations are left uncertain about the FLSA status of paramedics employed by a fire or police department, and face both staggering backpay liability and either costly reorganization of their fire departments or further liability for future overtime pay. This Court should resolve this conflict so that local governments can plan the organization of their emergency services with certainty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 19, 1994

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-2627

JAMES M. ALEX, *et al.*,
Plaintiffs-Appellees,

v.

CITY OF CHICAGO,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 3892—John F. Grady, *District Judge.*

No. 93-2630

MICHAEL M. MCKITTRICK, *et al.*,
Plaintiffs-Appellees,

v.

CITY OF CHICAGO,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 3945—John F. Grady, *District Judge.*

ARGUED APRIL 22, 1994—DECIDED JULY 21, 1994

Before BAUER and FLAUM, *Circuit Judges,* and GRANT, *District Judge.**

FLAUM, *Circuit Judge.* These consolidated cases involve identical claims by current and former paramedic employees of the Fire Department of the City of Chicago that they are entitled to overtime pay for hours worked in excess of 40 hours per week, in accordance with section 7(a) of the Fair Labor Standards Act, 29 U.S.C. § 207(a)(1). The City asserts nonliability under section 7(k) of the Act which establishes a limited exemption from the overtime provision for employees in "fire protection activities," 29 U.S.C. § 207(k). There being no material facts in dispute, the plaintiffs and the City filed cross motions for summary judgment. The district court found for the plaintiffs as to liability; the parties then reached agreement as to the computation of damages should the district court's orders survive appellate review.[1] They do.

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* The Honorable Robert A. Grant of the Northern District of Indiana is sitting by designation.

[1] Because the determination of damages in this case will be mechanical and uncontroversial, the district court's orders are appealable. *See Parks v. Pavkovic,* 753 F.2d 1397, 1401 (7th Cir.), *cert. denied,* 473 U.S. 906 (1985). On a related note, the district court, on the City's motion, entered final judgment on its orders disposing of the plaintiffs' first claims (of their two-claim complaints) pursuant to Rule 54(b). We agree with the City's current position that resort to Rule 54(b) was unnecessary (and indeed inappropriate) because plaintiffs' second "claims" merely stated an alternative ground for relief. *See Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.,* 860 F.2d 1441, 1445 (7th Cir. 1988). In their second claims, Plaintiffs' had sought an intermediate overtime recovery as "law enforcement" employees under section 7(k) in the event they were not deemed entitled to full overtime under section 7(a) though not denied recovery altogether as "fire protection" employees under § 7(k).

I.

A.

Because the nature of the paramedics' duties and training is crucial to the application of the relevant law in this area, we will describe the role of paramedics within the Chicago Fire Department as agreed by the parties below. The Fire Department is organized into five divisions: (1) the Bureau of Fire Suppression and Rescue; (2) the Bureau of Fire Prevention; (3) the Bureau of Administrative Services; (4) the Bureau of Support Services; and (5) the Bureau of Emergency Medical Services. Regular fire fighters and rescue personnel fall under the authority of the Bureau of Fire Suppression and Rescue, while paramedics serve in the Bureau of Emergency Medical Services (EMS). Eligibility, qualifications and job classifications are different for paramedics and fire fighters. However, the same collective bargaining unit and agreement covers both paramedics and firefighters, and paramedics are on the same pay scale, receive the same benefits and participate in the same pension fund as firefighters. Paramedics are assigned to ambulances located in Chicago fire stations. Like firefighters, paramedics normally work a platoon schedule consisting of 24 hours on duty, followed by 48 hours off duty, with every fifth workday off—amounting to 120 hours of duty in an eighteen-day work cycle.

The basic mission of the paramedics is to provide emergency medical care, life support (basic and advanced) and transportation to hospitals for injured or ill people. The paramedics are certified by the State of Illinois as Emergency Medical Technicians-Paramedic, and each must undergo at least forty hours per year of continuing education in medical services to maintain certification; the Bureau of EMS provides ongoing training. The paramedics are not trained, expected or allowed to perform fire suppression or rescue services. They may not enter

burning buildings or smoke-laden areas and are subject to discipline if they engage in fire fighting activities. Paramedics must remain in an area away from the immediate scene of a fire and do not treat victims until they have been safely evacuated from the fire vicinity. Fire fighters and specialized rescue personnel extricate victims from hazardous situations; paramedics do not. They have not been taught how to use, and do not carry, hydraulic jacks, cutting torches, saws, ropes or other extrication equipment. Paramedics may, however, provide life support to stabilize an entrapped victim while fire fighters or rescue personnel are attempting extrication. While paramedics may not work to free a physically entrapped victim, brief deposition testimony indicated that at one time some paramedics (who attended a continuing education program) were shown how to use backboards and similar devices to safely remove injured automobile accident victims from their vehicles.

Paramedics are not automatically dispatched to all fires, crime scenes or accidents; they are sent out only when there is a report of injury or substantial likelihood of injury. In a typical year, at least half of paramedic responses involve nontraumatic, noncardiac medical emergencies; e.g. epileptic seizures, asthma attacks, diabetic reactions, emphysema-related episodes. Less than one percent are fire-related and less than five percent are violence or law-enforcement-related. In 1990, for example, Chicago Fire Department paramedics responded to 212,367 calls: 111,133 (52.3%) were medical emergencies, 79,370 (37.4%) were trauma emergencies, 8,227 (3.9%) were cardiac emergencies, 7,136 (3.4%) were obstetric emergencies, and 2,452 (1.2%) were psychiatric emergencies.[2] (The remaining calls were either for additional

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[2] As a percentage of working time spent on calls, medical emergencies constituted 51.3%, trauma emergencies 35.1%, cardiac emergencies 5.3%, obstetric emergencies 3.4%, and psychiatric emergencies 1.2%.

units or for non-emergencies.) Of the calls, 1,476 (0.7%) were from fire scenes, 26,590 (12.5%) were from scenes of vehicular accidents (of all sorts), 6,557 (3.1%) were from shooting or stabbing incidents, and 2,600 (1.2%) involved drug overdoses. The Chicago Police Department was present at 52,394 (24.7%) of the response scenes; fire suppression personnel were at 37,875 (17.8%). (Fire suppression personnel sometimes respond to non-fire calls for a variety of reasons not quantitatively categorizable on this record.) When the paramedics are not responding to calls, they spend most of their time cleaning and maintaining equipment and supplies at their stations.

B.

Section 7(a) of the Fair Labor Standards Act (FLSA) requires employers to pay their employees overtime compensation of one-and-one-half times their normal wage for hours worked in excess of forty hours per week. Since 1985, it has been clear that state and local government employers do not enjoy constitutional immunity from the strictures of the Act, which Congress, in 1974, had extended to explicitly cover them. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 533-34, 557 (1985). However, section 7(k) of the Act, also added in 1974, provides a partial exemption for public agency employers of law enforcement and fire protection personnel by upping the threshold at which overtime compensation entitlement begins. 29 U.S.C. § 207 (k). Under the statutory scheme as put into effect by the Labor Department, employees to whom the fire protection exemption applies do not receive overtime compensation until hours worked during an applicable work cycle exceed a rate of fifty-three hours per week; law enforcement employees are entitled to overtime pay when their work rate exceeds forty-three hours per week. *See* 29 C.F.R. §§ 553.201(a), 553.230(c).

Since April 15, 1986—the date declared by Congress, in the aftermath of *Garcia*, as the compliance deadline for

local governments with section 7 of the Act, *see* Pub.L. 99-150, § 2(c)(1)—the City of Chicago has treated Fire Department paramedics as subject to the § 7(k) fire protection exemption by only paying them overtime compensation for hours worked in excess of 136 hours per eighteen-day cycle (i.e. fifty-three hours per week over 18 days). These suits represent an effort by the paramedics to establish that § 7(k) does not apply to them at all, or, in the alternative, applies to them as law enforcement rather than fire protection employees (thus entitling them to overtime pay for work in excess of 110 hours per eighteen-day cycle). Relying on Labor Department regulations and letter rulings interpreting the statutory language, the district court found that Chicago Fire Department paramedics do not fall within the scope of § 7(k) and are fully entitled to overtime compensation for hours worked in excess of forty hours per week as generally set out in § 7(a).

II.

Section 7(k) only covers "employee[s] in fire protection activities or . . . law enforcement activities." Plaintiffs first contend that this passage alone should dispose of this appeal because its "unambiguous language" does not reach employees whose duties are medical and not related to the extinguishment or control of fires. They are right that when statutory meaning is clear with respect to the issue at bar judicial inquiry normally should end without heed to the embellishments of secondary materials like legislative history, regulations or administrative rulings. *See Connecticut National Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992); *Board of Governors v. Dimension Fin. Corp*,. 474 U.S. 361, 368 (1986) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)). They are wrong, however, to suggest that there is no ambiguity as to whether Fire Department paramedics are employees engaged in "fire pro-

tection activities." As the district court noted, "fire protection" has a potentially broader connotative sweep than a phrase like "fire prevention" (or "fire suppression") and can reasonably extend to any activity typically part of a safety-minded response to a fire. Rapidly reacting medical teams performing first-line treatment and triage duties at fire scenes are responding to the very immediate and direct consequences of a fire. Such activities, in a not overly broad sense, protect people from the dangers of fires. That Fire Department paramedics respond to fires much less frequently than to other types of emergencies, most of which do not even involve fire hazards, reflects a question of degree that the unadorned phrasing of the statute does not resolve. We therefore follow established practice, and the lead of other courts that have considered the issue, by turning for further guidance to the explications provided by the governmental branch charged with administering the Act. *See Thomas Jefferson University v. Shalala*, 62 U.S.L.W. 4601, 4604 (U.S. June 21, 1994); *National Railroad Passenger Corp. v. Boston and Maine Corp.*, 112 S. Ct. 1394, 1401-02 (1992); *Chevron*, 467 U.S. at 843; *see also Justice v. Metropolitan Government of Nashville*, 4 F.3d 1387, 1392-93 (6th Cir. 1993); *Nalley v. Mayor and City Council of Baltimore*, 796 F. Supp, 194, 198 (D. Md. 1992); *Horan v. King County*, 740 F. Supp. 1471, 1475-77 (W.D. Wash. 1990).[3]

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[3] There is a snippet of legislative history on point. On the House floor, when the 1974 amendments to FLSA were being discussed, the ranking member and the chairman of the General Labor Subcommittee expressed their belief that section 7(k) "is intended to cover those employees directly employed by a public agency who are engaged in rescue or ambulance activities which are substantially related to fire protection or law enforcement activities. In some instances these rescue or ambulance crews are a part of the fire or police department. In other cases they must be under a separate department of the same public agency, but their activities substantially include rescue and ambulance work associated with fire protection and law enforcement." *See Justice*, 4 F.3d at 1396

In 1987, the Labor Department issued regulations dealing with the application of FLSA to public employees, *see* 29 C.F.R. part 553, and devoted a subpart to "Fire Protection and Law Enforcement Employees of Public Agencies" and the nature of their § 7(k) statutory exemptions. Section 553.210, subsection (a), begins by defining "employee . . . in fire protection activities" rather narrowly, requiring, among other things, that such an employee be authorized and responsible for "the prevention, control or extinguishment" of fires. However, the subsection concludes by stating that "[t]he term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See § 553.215." Section 553.215—similarly cross-referenced in § 553.211's definition of "employee . . . in law enforcement activities"—is entitled "Ambulance and rescue service employees" and provides as follows:

> (a) Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by sections 7(k) and 13(b)(20) if their services are substantially related to fire-

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n.2 (quoting 120 Cong. Rec. 8598 (1974)); *see also* 120 Cong. Rec. 7317-18 (1974). Of course, legislative history, especially isolated remarks of individual legislators, *see Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979), could not be used to find ambiguity, or contrary intent, in statutory language that, with respect to a case in hand, is clear on its own terms without rendering nugatory the "plain meaning" canon of construction. Here, however, we conclude, without reference to other sources, that "fire protection activities" is a phrase that reasonably may or may not be understood to encompass Fire Department paramedics who are based at fire stations and whose duties include responding to fire calls. The congressmen's expressed desire to include some EMS workers within the scope of the exemption only serves to reinforce our conclusion that Labor Department guidance in this regard (which, as we shall see, closely tracks the language and tenor of the floor statements) is an appropriate reference.

> fighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. As provided in § 553.213(b), where employees perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.
>
> . . . .
>
> (c) Ambulance and rescue service employees of private organizations do not come within the section 7(k) or section 13(b)(20) exemptions even if their activities are substantially related to the fire protection and law enforcement activities performed by a public agency or their employer is under contract with a public agency to provide such services.

In addition, § 553.212 provides that employees who otherwise would qualify for an exemption under §§ 553.210 or .211 are nonetheless not to be treated as exempt employees if they spend more than twenty percent of their work time "engage[d] in . . . nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities." As an example of nonexempt work, the regulation describes "firefighters who work for forest conservation agencies . . ., during slack times, plant[ing] trees and perform[ing] other conservation activities unrelated to their firefighting duties."

The parties, to begin with, dispute whether the more elaborate test set out in § 553.215(a) applies to this case at all. The City observes that .215(a) only purports to speak to "[a]mbulance and rescue service employees of a

public agency *other* than a fire protection . . . agency" and the plaintiffs here *are* employees of the Chicago Fire Department. The City contends that for ambulance employees of public agencies charged with fire protection the regulations contemplate a wholly separate test, turning on whether, as set out in § 553.210(a), "such personnel form an integral part of the public agency's fire protection activities." The district court agreed in principle but relied on .215(a) anyway because, it reasoned, if the plaintiffs' services are not *"substantially related* to firefighting . . . activities" under .215(a), they could not be "an *integral part"* of the fire department's "fire protection activities"; that is, linguistically, "integral" implies a tighter fit than "substantially related." The plaintiffs take a different approach. They believe that only one test exists and .215(a) states it, pointing for support to the cross-reference to .215(a) appearing in .210(a) immediately after the "integral part" sentence and also invoking the commonsense appeal of a single test, which would avoid disparities in overtime entitlements between similar workers from city to city because of local differences in emergency service organizations. For their part, the courts are split as to the independent significance of the "integral part" language. *Compare Wouters v. Martin County, Fla.,* 9 F.3d 924, 931 (11th Cir. 1993), *cert. filed,* 62 U.S.L.W. 3809 (May 23, 1994); *Nalley,* 796 F. Supp. at 198; *Alexander v. Kansas City, Kansas,* 1993 WL 393013, *6 (D. Kan. Sept. 23, 1993), *with Justice,* 4 F.3d at 1395; *Bond v. City of Jackson,* 939 F.2d 285, 287 (5th Cir. 1991) (applying the cross-reference without comment); *Littlefield v. Town of Old Orchard Beach,* 780 F. Supp. 64, 67 (D. Maine 1992) (same).

We agree with the plaintiffs and the sixth circuit in *Justice* that the regulations only state one test for the § 7(k) exempt status of publicly employed emergency medical personnel. First of all, while .215(a) clearly purports to lay out a test only for public agencies other than

fire departments, .210(a) does not so unambiguously pronounce that its "integral part" language states a contrasting test for fire departments. To be sure, by its location within a paragraph classifying fire department employees generally and by referencing the "public agency's fire protection activites", the "integral part" formula implicitly refers only to fire department ambulance personnel. But if the sentence were intended to be more than just precatory, one would expect that it would find the more prominent placement and contain the more laborious phrasing that typically characterize regulatory tests of this sort and do characterize neighboring exemption tests in this subpart. In this light especially, the cross-reference to .215 most likely indicates that the fleshed-out formulation of that section is the appropriate test to apply to ambulance personnel from any public agency. We cannot agree that this cross-reference is superfluous or accidental—§ 553.211(b) repeats it in an analogous reference to ambulance personnel of law enforcement agencies and the previous version of the regulations, issued in 1974, also contains it; or that it is merely organizational, *see, e.g., Nalley,* 796 F. Supp. at 198—the subpart is short and needs no (and contains no other) oddly phrased road markings, and the contextual and commonsense implication that the cross-reference means something substantive is strong. *Cf. Freeman United Coal Mining Co. v. Foster,* No. 93-2923, slip op. at 7-8 (7th Cir. July 18, 1984). No doubt the scheme could have been set out less clumsily—the opening phrase of .215, especially, implies a dichotomous arrangement [4]—but inartful draftsmanship should not be misidentified as calculated com-

[4] The last sentence of .215, constituting subsection (c), adds to the suggestion of intricate classification in this area by formally announcing that privately employed ambulance workers do not fall within the § 7(k) exemption even if "their activities are substantially related to the fire protection . . . activities performed by a public agency . . . ." This too could have been said much more straightforwardly (or not at all) since by its own terms § 7(k) clearly only applies to public agency employers.

plexity.[5] As the sixth circuit has pointed out, a unitary approach is consistent with the little legislative history on point. *See Justice,* 4 F.3d at 1395-96; *supra* note 3. And more importantly (since we are interpreting regulations), it seems to clearly comport with the relevant *regulatory* history. When the Labor Department issued these regulations, it also addressed outside comments that the regulations as proposed had attracted. *See* 52 Fed. Reg. 2012 *et seq.* (Jan. 16, 1987). In responding to a suggestion that all ambulance personnel employed by a fire department be treated as subject to the section 7(k) exemption as opposed to only those who form an "integral part" of the agency's fire protection services under .210 as adopted, the Department responded as follows:

> The legislative history of the 1974 FLSA Amendments . . . clearly indicates that only those employees who are engaged in ambulance or rescue service activities which are *substantially related* to fire protection or law enforcement activities can qualify for these exemptions. . . . For this reason the Department has not adopted this recommendation.

52 Fed. Reg. 2022 (original emphasis). And in responding to the same objection to the "integral part" language of § 553.211, the Department explained:

> As discussed above in the analysis of the comments on § 553.210, the Congress clearly intended that only those ambulance and rescue service employees whose activities are substantially related to fire protection or law enforcement activities can qualify for exemption under section 7(k) or 13(b)(20).

Id. By echoing the locution of .215 in explaining the "integral part" language of .210, the Labor Department

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[5] **The "plain language" of .215, or more precisely a negative inference drawn from the plain language—referring to employees of "other" agencies—does not resolve matters here, as the City insists, because the language of *.210*, the appropriate starting point of our analysis, almost as plainly counters that inference.**

has confirmed what the cross-reference "See § 553.215" strongly implies: that the substantial relatedness of the services of a fire department's ambulance personnel to the agency's fire protection activities, as explicated in .215, tests such personnel's eligibility for section 7(k) exemption just as it tests all publicly employed ambulance personnel's eligibility for the exemption. Section 553.210 describes in general terms what § 553.215 expounds in more detail.[6] And so it is with the latter section that our inquiry proceeds.

Section 553.215(a) sets out a two-part, conjunctive test for determining whether ambulance and rescue service employees are engaged in fire protection or law enforcement activities for the purpose of the statutory exemption: (1) Have they "received training in the rescue of fire, crime, and accident victims . . . ."? and (2) Are they "regularly dispatched to fires, crime scenes, riots, natural disasters and accidents"? Because we conclude that this case is controlled by the first prong of the test, we need

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[6] Nothing in the several letter rulings that the Wage and Hour Division has issued in this area weakens this conclusion. The letters for the most part simply restate the regulatory rules and follow their structure. *See, e.g.*, Adm. Ltr. Rul. (May 7, 1993), *reprinted in Fair Labor Standards Handbook*, App. III at 339 (April 1994); Adm. Ltr. Rul. (Oct. 21, 1987), *reprinted in Fair Labor Standards Handbook*, App. III at 174 (March 1988). The 1993 Letter Ruling does say that "the application of § 7(k) to EMS employees of public agencies that are not an integral part of fire protection or law enforcement agencies must be made on a case-by-case basis . . . ." However, taken in context, this statement does not imply that "integral part" and "substantially related" are distinct standards. Rather, it only explains that because EMS employees of nonspecialized public agencies can be expected to receive "[s]ome calls . . . related to law enforcement emergencies, some . . . related to fire protection emergencies, and some . . . related to medical emergencies not attributable to either law enforcement or fire protection," properly classifying them as nonexempt, fire-protection exempt or law-enforcement exempt will typically "depend[] on the nature of the EMS calls serviced." Adm. Ltr. Rul. (May 7, 1993).

not and do not reach the difficult question of what constitutes regular dispatch on qualifying calls (or, in light of the undisputed facts of the case, the seemingly more clear-cut issue of whether § 553.212's twenty-percent-non-exempt-work ceiling has been reached here).

What did the Department intend by focusing attention on ambulance and rescue workers' "training in the rescue of . . . victims"? All EMT's are surely trained to provide some measure of emergency medical care to those in need; and the alleviation of any danger to health or physical well-being, whether presently medical (i.e. an injury or malady already within the body) or still only potential so (i.e. some external harm threatening to the body), can constitute a rescue in a permissible usage of the work. But if the Department was not seeking to fashion an illusory dividing line in this first prong of .215(a)—one which all emergency service personnel would cross almost by definition—"training in . . . rescue" must have been meant in a more restrictive sense. A 1987 Administrative Letter Ruling confirms this notion. The letter ruling explains:

> Under these circumstances, the term "rescue" refers to actions taken to free a victim from imminent danger or harm by the most expeditious means. In many cases, this may require an EMT to take action beyond merely applying emergency medical treatment such as bandaging, administering oxygen, or transporting an individual to a hospital. For instance, there may be situations where the EMTs, as the first responders at the scene of an automobile accident, must extricate an injured person from a vehicle in order to begin treatment and preparation for movement as soon as possible. As stated in the material enclosed with your inquiry, the "EMT will have to use whatever means are available to gain access to the patient and disentangle him from the wreckage. . . ." This means that an EMT must be properly trained to operate special types of equipment, such as hydraulic "spread-

ers" or chemical foam extinguishers, in case they are available for their use at the accident scene. Therefore, we interpret the requirement that an EMT be "trained to rescue" as meaning that the individual has knowledge of basic life-saving procedures and life-support procedures (i.e. CPR, administering oxygen, and extrication techniques). However, it is not necessary for an EMT to routinely perform any or all of these procedures in order to meet the requirements of the first test referred to above.

You have indicated that the EMTs who are the subject of your inquiry are not trained to rescue fire victims by removing them from burning buildings or other structures. This would require (1) extensive training in fire-suppression and evacuation techniques and (2) special equipment and protective clothing which could not be carried or transported by EMT crews. Under these circumstances, the obligation of an EMT to "rescue" a victim is limited by the nature of the event (fire) and the ability of the EMT to safely and efficiently provide assistance. Therefore, it is our opinion that an EMT need not be trained in fire-suppression or evacuation procedures in order to be engaged in activities which are "substantially related" to firefighting or law enforcement.

Adm. Ltr. Rul. (October 9, 1987), *reprinted in Fair Labor Standards Handbook*, App. III at 173 (March 1988). The thrust of this letter is clear. While EMTs need not in fact be firefighters to fall under § 7(k), their training in "rescue" must go beyond the purely medical. They must be able to extricate victims from *external* threats to life and limb—" 'rescue' refers to actions taken to free a victim from imminent danger or harm . . . beyond merely applying emergency medical treatment"; "an EMT must be properly trained to operate special types of equipment, such as 'hydraulic spreaders' . . ."; "[t]herefore . . . 'trained to rescue' . . . mean[s] that the individual

has knowledge of basic lifesaving procedures and life-support procedures (i.e. CPR, administering oxygen, *and* extrication techniques)." Indeed, this distinction between training in the relief of medical danger and training in administering to surrounding dangers is a relatively unartificial way to put into effect the subclassification of emergency ambulance personnel contemplated in .215. Other circuits that have interpreted the regulation and the letter ruling agree that instruction in extrication, that is the freeing from physical entanglement or other environmental danger is a *sine qua non* of "rescue" training under § 553.215. *See Justice*, 4 F.3d at 1397-98; *O'Neal*, 980 F.2d at 678. *But see Bond*, 939 F.2d at 288 (apparently not distinguishing extrication from purely medical rescue efforts).

It is undisputed that Chicago Fire Department paramedics do not perform and are not trained to perform "rescue" activities beyond those of a medical nature. They are not trained to free victims from "imminent danger or harm by the most expeditious means." Such duties are explicitly reserved for firefighters and special rescue personnel and are off-limits to the paramedics. While some paramedics may have been trained in the safe movement of victims by use of backboards, the City has not shown that equipment of this sort is other than medical in nature in that it is designed to prevent aggravation of certain kinds of existing wounds and injuries and does not facilitate or enable paramedics to deliver victims from the threat of external perils.[7] Because Chicago has carefully delegated tasks and training of the latter type to personnel

[7] Because the City as employer bears the burden of proving the applicability of the FLSA exemption, *see Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974); *Klein v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279, 283 (7th Cir. 1993), it could avoid summary judgment only by making a showing sufficient to establish that the paramedics were trained to rescue victims from external dangers. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

other than paramedics, § 553.215 of the regulations directs that it may not treat paramedics as engaging in exempt status fire protection or law enforcement activities under § 7(k) of the statute. Therefore, the plaintiffs are entitled to summary judgment.

AFFIRMED.

A true Copy:

Teste:

. . . . . .

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Date: July 21, 1994

BEFORE: HONORABLE WILLIAM J. BAUER,
Circuit Judge

HONORABLE JOEL M. FLAUM,
Circuit Judge

HONORABLE ROBERT A. GRANT,
District Judge *

No. 93-2627

JAMES M. ALEX, *et al.*,
Plaintiffs-Appellees

v.

CITY OF CHICAGO,
Defendant-Appellant

No. 93-2630

MICHAEL M. MCKITTRICK, *et al.*,
Plaintiffs-Appellees

v.

CITY OF CHICAGO,
Defendant-Appellant

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* The Honorable Robert A. Grant, District Judge of the Northern District of Indiana, is sitting by designation.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 92 C 3892, John F. Grady, Judge

JUDGMENT—WITH ORAL ARGUMENT

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

[Docketed Apr. 3, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 90 C 3945

MICHAEL M. MCKITTRICK, *et al.*,
Plaintiffs,

v.

CITY OF CHICAGO, ILLINOIS,
Defendant.

MEMORANDUM OPINION

This cause of action, brought under § 7 of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207, for unpaid overtime compensation, comes before the court on plaintiffs' motion for partial summary judgment and defendant's cross-motion for summary judgment. The court will grant plaintiffs' motion and deny defendant's motion.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). A "genuine issue of material fact exists only where 'there is sufficient evidence favoring the nonmoving party for a jury to return a verdict

for that party.'" *Dribeck Importers, Inc. v. G. Heileman Brewing Co.*, 883 F.2d 569, 573 (7th Cir. 1989) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). In considering such a motion, the court must view all inferences in the light most favorable to the non-moving party. *See Regner v. City of Chicago*, 789 F.2d 534, 536 (7th Cir. 1986).

FACTS

The dispositive facts are not disputed. The plaintiffs are paramedics currently or formerly employed by the defendant, the City of Chicago. Plaintiffs are employed within the Bureau of Emergency Medical Services ("EMS") of the Chicago Fire Department ("CFD").[1] The mission and responsibility of EMS is to deliver emergency medical assistance, life support and transportation to ill and/or injured citizens of the City. This mission does not include the performance of fire suppression and/or rescue services.

Paramedics employed by EMS receive different job training and must meet different hiring qualifications than firefighters and other rescue personnel employed by FSR. The EMS paramedics must be certified as State of Illinois Emergency Medical Technician-Paramedics, and in order to maintain that certification they are required to complete a minimum of 40 hours of continuing education related to medical care each year.

EMS paramedics are not automatically dispatched to fires, crime scenes or accident scenes;[2] rather, they are

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[1] There are four other main divisions within the CFD: (1) the Bureau of Fire Suppression and Rescue ("FSR"); (2) the Bureau of Fire Prevention; (3) the Bureau of Administrative Services; and (4) the Bureau of Support Services. Firefighters and rescue personnel are assigned to FSR.

[2] According to statistics submitted by both parties, in a average year less than one percent of plaintiffs' responses are for fire-related emergencies. The majority of plaintiffs' responses involve

dispatched to these emergencies only when there are reports of injured persons or a substantial likelihood of injury. When they are dispatched to the scene of a fire (or other emergencies) to provide medical assistance to injured persons, they are by CFD regulation required to remain on standby in a staging area away from the danger zone. Only after firefighter/rescue personnel have extricated the victims from the dangerous situation, and moved them to a safer location, do the plaintiffs provide medical aid and transportation to a hospital, if needed. Plaintiffs are neither trained nor authorized to perform rescue work or extinguish fires and they are subject to discipline if they do. Moreover, they are not trained or authorized to use "extrication equipment," whereas firefighter/rescue personnel are.

Plaintiffs have been party to the same collective bargaining agreement as the members of the FSR and Support Services since 1977. Under the current agreement, plaintiffs (along with FSR and Support Services Bureaus employees) work what is labelled "platoon duty," which is an 18-day work cycle consisting of 24 consecutive hours on duty followed by 48 consecutive hours off duty, with every fifth scheduled work day off. The agreement provides that where employees are "authorized to work any time on duty in addition to the normal shifts . . . [such time] shall be considered as working overtime hours" to be paid at a rate of one and one-half times the regular rate.

Since April 15, 1986, defendant has treated plaintiffs as employees engaged in "fire protection activities" within the meaning of § 7(k) of FLSA, 29 U.S.C. § 207(k).[3]

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medical emergencies unrelated to fires, i.e., diabetic reaction, epilepsy, asthma, and the like.

[3] Section 207(k) (commonly referred to as the 7(k) exemption) provides that

> No public agency shall be deemed to have violated subsection [207](a) of this section with respect to the employment of any employee in fire protection activities . . . if—

Under this statute, plaintiffs are not eligible for overtime until they have worked in access of 136 hours in any 18-day cycle; whereas, under the agreement, plaintiffs would be eligible for overtime after having completed 120 hours of work in any 18-day cycle.

Plaintiffs brought the present action claiming that they are not employees engaged in "fire protection activities," and that they are therefore entitled, under § 7(a)(1) of FLSA, 29 U.S.C. § 207(a)(1),[4] to overtime payments from July 10, 1987, to the present for any time they have worked in excess of 40 hours per week.

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(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours . . . in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

[4] Section 7(a)(1) provides that

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1).

DISCUSSION

I. Statutory Background

As originally enacted, the FLSA specifically excluded states and cities from its coverage. In 1974, Congress amended the Act to extend its protection to government employees. Subsequent to those amendments, the Supreme Court held that application of the FLSA to state or local governments "in areas of traditional governmental functions" was unconstitutional. *See National League of Cities v. Usery,* 426 U.S. 833, 845, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). In 1985, the Court overruled *National League of Cities,* based on its conclusion that "the political process ensures that laws that unduly burden the States will not be promulgated." *Garcia v. San Antonio Metro Transit Auth.,* 469 U.S. 528, 556, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). In response to *Garcia,* Congress amended FLSA to provide that public agencies shall be liable under the Act for conduct occurring on or after April 15, 1986. *See* § 2(c)(1) of the 1985 Amendments.[5]

The current Act provides generally for the payment of at least one and one-half times an employee's regular wages for any "workweek longer than forty hours." *See* 29 U.S.C. § 207(a)(1). Congress, however, provided certain industries with partial exemptions from this standard forty hour workweek. One such industry was the "fire protection" industry, and, as previously noted, the threshold triggering the obligation to pay overtime to employees engaged in "fire protection activities" is to be based on a ratio of 218 hours to every 28 consecutive working days. *See* 29 U.S.C. § 207(k) (1985).

Congress did not define the critical phrase "fire protection activities" in the 1985 Amendments.[6] The Depart-

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[5] Section 7(k), 29 U.S.C. § 207(k), was added as part of the 1985 Amendments.

[6] As a district court recently noted, "[t]he Supreme Court has made clear that courts should interpret coverage under the FLSA

ment of Labor ("DOL"), however, has promulgated regulations attempting that definition:

> [T]he term . . . refers to any employee (1) who is *employed by an organized fire department* or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires. . . . *The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See § 553.215.*

29 C.F.R. § 553.210(a) (1987) (emphasis added).

Section 553.215—a regulation specifically dealing with ambulance and rescue service employees only—reads as follows:

> (a) Ambulance and rescue service *employees of a public agency other than a fire protection or law enforcement agency* may be treated as employees engaged in fire protection . . . activities of the type contemplated by section[] 7(k) . . . if their services are *substantially related to firefighting* . . . activities *in that* (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of

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liberally, 'to apply to the furthest reaches consistent with congressional direction,' while they should construe exemptions from coverage very narrowly." *Spires v. Ben Hill County*, 745 F.Supp. 690, 696 (M.D. Ga. 1990) (quoting *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 296, 105 S.Ct. 1953, 1959, 85 L.Ed.2d 278 (1985) (quoting *Mitchell v. Lublin, McGaughy, & Associates*, 359 U.S. 207, 211 (1959))).

> their respective duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. As provided in § 553.213(b), where employees perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.

29 C.F.R. § 553.215(a) (1985) (emphasis added).

Count I of plaintiffs' amended complaint alleges that they are not employees engaged in "fire protection activities" and, therefore, do not fall within the partial exemption afforded by § 207(k). Instead, they argue that, pursuant to § 207(a)(1), they are entitled to overtime compensation after they have exceeded 40 hours of labor in any workweek,[7] and that defendant, since June of 1987, has willfully and in bad faith failed to pay plaintiffs according to this section. Plaintiffs seek a declaratory judgment to the effect that they do not fall under the § 207(k) exemption, and a judgment for past earned and unpaid overtime, as well as liquidated damages, interest, and attorney's fees pursuant to 29 U.S.C. § 216(b). Plaintiffs now move for partial summary judgment as to Count I of their amended complaint[8] and defendants cross-motion for summary judgment.

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[7] Plaintiffs currently work an average of 44.8 hours per week.

[8] Plaintiffs' second claim is for alternative relief: in the event the court finds plaintiffs to be subject to the partial exemption embodied in § 207(k), they argue that they are employees "in law enforcement activities" under § 207(k) and should be paid overtime accordingly. Plaintiffs pray for this alternative relief because, under 29 C.F.R. § 553.220, an employer must pay law enforcement employees overtime compensation based on a lower threshold ratio of hours to days worked than is the case with fire protection employees; i.e., 171 hours per 28 consecutive workdays compared to 216 per 28 consecutive workdays, respectively.

II. Motions for Summary Judgment

The Seventh Circuit has not addressed the issue of whether and to what extent paramedics are to be considered and treated as employees engaged in "fire protection activities" within the meaning of § 7(k) of FLSA, 29 U.S.C. § 207(k) (1985). A few courts from other jurisdictions have analyzed this issue and have reached differing results. *Compare Carlson v. City of Minneapolis,* 925 F.2d 264 (8th Cir. 1991) (plaintiffs not within the 7(k) exemption), *Horan v. King County, Wash.,* 740 F. Supp. 1471 (W.D. Wash. 1990) (same) and *Spires v. Ben Hill County,* 745 F.Supp. 690 (M.D. Ga. 1990) (same) *with Bond v. City of Jackson,* 939 F.2d 285 (5th Cir. 1991) (plaintiffs within the exemption) and *O'Neal v. Barrow County Bd. of Comm'rs,* 743 F.Supp. 859 (N.D. Ga. 1990) (same).

This court agrees with the *Horan* court that, in deciding plaintiffs' and defendant's motions for summary judgment, the court must determine (1) whether the statutory language of the FLSA § 7(k) exemption for those employees engaged in "fire protection activities" is clear and unambiguous on its face; (2) if it is not, "whether DOL's regulations interpreting section 7(k), 29 C.F.R. §§ 553.210 and 553.215, are reasonable and consistent with the FLSA's legislative purpose;" and (3) if the DOL regulations are consistent, whether, under the regulations, plaintiff paramedics may be treated as being engaged in fire protection activities and, therefore, within the § 7(k) exemption to the 40 hour work week provision. *Horan,* 740 F.Supp. at 1475. Finally, if the court rules in plaintiffs' favor, it must decide whether plaintiffs are entitled to liquidated damages, costs and attorneys fees, pursuant to 29 U.S.C. § 216(b).

A. Statutory Language

Plaintiffs contend that the phrase "fire protection activities" used in 29 U.S.C. § 207(a)(1) is unambiguous and was not meant to encompass paramedics; not even paramedics who, like plaintiffs, are employed by and are a part of a state-run fire department. The importance of the question of this provision's possible ambiguity is that "[i]f the statute is clear and unambiguous, 'that is the end of the matter, for the court, *as well as the agency*, must give effect to the unambiguously expressed intent of Congress.'" *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 368, 106 S.Ct. 681, 685, 88 L.Ed.2d 691, 698 (1986) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694, 703 (1984)) (emphasis added). In sum, "when the language of a statute is clear on its face, the traditional deference courts pay to agency interpretation should not be applied to alter the clearly expressed intent of Congress." *Horan*, 740 F.Supp. at 1476 (citing *Dimension Fin. Corp.*, 474 U.S. at 368, 106 S.Ct. at 685, 88 L.Ed.2d at 698). Thus, if the court adopts plaintiffs' view that "fire *protection* activities" refers only to the prevention, control, and extinguishment of fires, as well as the extrication of victims from fires, the DOL regulations recited above would be of no weight in the disposition of the present motions. This rule has been labelled the "plain meaning rule," and "[c]ontrary to plaintiffs' suggestion, [the] rule is not an absolute bar to considering legislative history but 'a flexible standard for ascertaining the intent of Congress.'" *Id.* (quoting *Heppner v. Alyeska Pipeline Serv. Co.*, 665 F.2d 868, 870 (9th Cir. 1981)).

Had Congress used the word "prevention" instead of "protection" the court would be more persuaded by plaintiffs' argument. The latter term, however, is what Congress used, and it is not clear whether that term refers only to typical firefighter duties or whether it also refers to the

duties of certain paramedics working for and/or in conjunction with municipal fire departments. To paraphrase the defendant, have you really *protected* someone from fire if they die on the sidewalk after being rescued by the firefighter? Fire protection could mean only those activities related to putting out fires and saving their victims, or it could mean "protecting" these victims by providing them with medical care, life support and transportation to a hospital facility. In fact, the term "protection" could also include other typical fire department employees, such as arson inspectors (who arguably protect the public from fire by helping the police trace the origins of illegally set fires). *Contra Carlson,* 925 F.2d at 266 (under DOL regulations arson investigators not engaged in fire protection activities because they do not prevent, control or put out fires). Succinctly stated, "fire protection activities" has no controlling denotative meaning that trumps the many possible connotative meanings of the phrase, and, therefore, "this court must look beyond the language of the statutory phrase to ascertain Congressional intent." *Horan,* 740 F.Supp. at 1477.

Unfortunately, the legislative history relating to the § 7 (k) exemption is sparse at best. Congress did not mention paramedics in the legislation nor did Congress discuss paramedics in the committee reports accompanying the 1985 Amendments. During the House floor discussion of the 1985 Amendments, the ranking member of General Labor Subcommittee, Congressman Quie, and the chairman of that same subcommittee, Congressman Dent, both stated that the then-proposed exemption was meant to include within its parameters certain "rescue or ambulance" workers. *See id.* at 1476-77 n. 3 (quoting 120 Cong. Rec. 8598 (1974)). The Supreme Court has repeatedly cautioned, however, that the isolated comments of individual members of Congress do not by themselves represent the views of Congress. *See e.g., Chrysler Corp. v. Brown,* 441 U.S. 281, 311, 99 S.Ct. 1705, 60 L.Ed.2d

208 (1979) (remarks of legislative sponsor are not controlling). This is not to say that Congressmen Quie and Dent's remarks are of no value. Inasmuch as there is no indication that the drafting committee either did or did not intend that paramedics fall under the ambit of § 7(k) —the committee reports simply do not address this issue— and this court finds the phrase "fire protection activities" to be ambiguous, the court cannot say that Congress intended that no paramedics would come within the exemption.

B. The FLSA' Legislative Purpose and The DOL Regulations

The purpose of the § 7(k) exemption to the standard 40 hours per standard five day workweek provision, mandated by 29 U.S.C. § 207(a)(1), was to ease somewhat the added fiscal burden that would otherwise be placed on state and local governments if they had to pay their public safety employees—whose jobs require unusually long workweeks—at least one and one-half times their normal salary for every hour they worked over 40 hours each workweek. Congress chose to balance the competing interests by making the exemption a partial—instead of total—one. As the *Horan* court pointed out, "Congress established the section 7(k) overtime exemption for 'those public employees who are most frequently required to work more than forty hours per week,' namely 'law enforcement and fire protection employees.'" 740 F.Supp. at 1478 (quoting S.Rep. No. 690, 93rd Cong., 2d Sess. 24 (1974)). And, this court agrees that

> [t]his language . . . is persuasive evidence that the purpose of the legislation is served by including within the section 7(k) exemption those publicly-employed ambulance and rescue service employees whose workhours are similar to those of firefighters or law enforcement personnel, and whose duties are substantially related to fire protection or law enforce-

> ment activities. The DOL regulations, 29 C.F.R. §§ 553.210 and 553.215, which include rescue service employees within the section 7(k) exemption, are consistent with the congressional purpose and must be given the force of law.

Id. (citation omitted).

C. 29 C.F.R. §§ 553.210(a) and 553.215

In deciding whether the § 7(k) exemption applies to plaintiffs, the court must "show great deference to the interpretation given the statute by the . . . agency charged with its administration." *Udall v. Tallman,* 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616, 625 (1965). Accordingly, the court now turns to the DOL regulations —29 C.F.R. §§ 553.210(a) and 553.215—which attempt to define the phrase "fire protection activity" and delimit the group of publicly employed paramedics that are subject to the 7(k) exemption. Before turning to the regulations, however, the court believes it is necessary to note some well established rules that must be applied in this case. First, the employer carries the burden of proving that the plaintiffs engage in fire protection activities, and the court must construe this classification against the employer. *See Idaho Sheet Metal Works, Inc. v. Wirtz,* 383 U.S. 190, 208-09, 86 S.Ct. 737, 748-49, 15 L.Ed.2d 694 (1966); *see also Mitchell v. Kentucky Fin. Co.,* 359 U.S. 290, 295 S.Ct. 756, 759-60, 3 L.Ed.2d 815 (1959). Second, "[w]hether the city has correctly classified the [plaintiffs] depends on the character of the [their] responsibilities and tasks, not on their job title or place of work." *Carlson,* 925 F.2d at 265 (quoting *Overstreet v. North Shore Corp.,* 318 U.S. 125, 132, 63 S.Ct. 494, 498, 87 L.Ed. 656 (1943)) (other citations omitted). "[I]n sum, the city must show the [plaintiffs] plainly and unmistakably come within the terms and spirit of the fire protection activities exception." *Id.* (citations omitted).

D. Plaintiff's Case

The four part test at the beginning of 29 C.F.R. § 553.210(a) defines generally what "fire protection activities" means in 29 U.S.C. § 207(k). It is obvious from even a cursory reading of the four conjunctively phrased factors—especially number (3) and (4)—that they describe the standard firefighter, and do not apply to plaintiffs at all. However, the concluding language of § 553.210 (a) provides that paramedics who are an "integral part of the public agency's fire protection activities" nonetheless fall within the § 7(k) exemption. *See* 29 C.F.R. § 553.210(a). Unfortunately, the phrase "integral part of" is not defined in the regulation, and the only guide provided by the DOL as to its meaning is a cross-reference to 29 C.F.R. § 553.215.

This cross-reference is problematic, however, because it refers to a section of the regulation that is also, on its face, inapplicable to plaintiffs. Section 553.215 states that paramedics whose "services are *substantially related* to fire fighting . . . activities" fall within 29 U.S.C. § 207(k). 29 C.F.R. § 553.215 (emphasis added) It further provides a two part test which defines the parameters of the phrase "substantially related." Section 553.215, however, applies only to "employees of a public agency *other than* a fire protection . . . agency," *id.* (emphasis added), and plaintiffs are employed by the CFD. This cross reference to § 553.215 could be meant to be merely a guide as to the meaning of the phrase "an integral part of" used in § 553.210(a).[9] This interpretation is doubtful inasmuch as the phrases "substantially related to" and an "integral part of" are different standards, the latter being more stringent than the former. It will be helpful, however, to

[9] The court does not believe that the cross reference is meant to imply that the two-part test in § 553.215, defining the meaning of "substantially related to," also defines the meaning of an "integral part of." Such a reading would collapse both standards into one, and render the two regulations "redundant and contradictory." *O'Neal*, 743 F.Supp. at 862.

determine whether plaintiffs meet what appears to be the less exacting standard.

The two-part test of § 553.215 is stated conjunctively. The first part of the test requires that the employees in question "have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective duties . . . ." In a letter ruling dated October 9, 1987, "the DOL wrote that the term 'rescue' contained in the first prong of the test 'refers to actions taken to free a victim from imminent danger or harm by the most expeditious means.' " *Horan*, 740 F.Supp. at 1478 (quoting DOL Administrative Letter Ruling of October 9, 1987, Fair Labor Handbook, App. III at 173, 174, Thom. Pub. Group, Inc. (March 1988)). Thus, being "trained to rescue" means "that an individual has knowledge of basic life-saving procedures and life-support procedures (i.e., CPR, administering oxygen, *and extrication techniques*)." *Id.* Plaintiffs do not meet this part of the test. While they are trained, certified, and authorized to provide medical care, life support and transportation to persons in need of medical assistance, they are neither trained, certified nor authorized to engage in activities such as entering burning buildings or extricating people from burning cars. In fact, plaintiffs are subject to discipline by the CFD if they do engage in such "rescue" activities. Furthermore, plaintiffs are required by CFD regulation to remain in a staging area away from the fire scene and to provide medical aid only after the victim has been removed by firefighters/rescue personnel to an area safely away from the fire scene. Inasmuch as plaintiffs "cannot officially perform rescues as . . . defined [above], allowing [them] to be treated as 'fire protection employees' would be inconsistent with DOL's October 9 letter ruling." *Horan*, 740 F.Supp. at 1479.

Because 29 C.F.R. § 553.215 is phrased in the conjunctive and the plaintiffs' jobs do not satisfy the first

part of that regulation, the court need not determine whether they satisfy the second part of the test. Further, because the court believes that "an integral part of"—the standard stated in 29 C.F.R. § 553.210(a)—is more exacting than § 553.215's "substantially related to" standard, and plaintiffs' jobs are not even "substantially related to" firefighting activities, the court declines to undertake a determination of whether plaintiffs are "an integral part of" CFD's fire protection activities.

Accordingly, the court grants plaintiffs' motion for partial summary judgment.

E. Relief.

As previously noted, plaintiffs have asked the court to award them liquidated damages, interest, costs, and attorney's fees, under 29 U.S.C. § 216(b).[10] Plaintiffs have also requested that, in the event that the court grants their motion, the court give plaintiffs a reasonable period of time in which to pursue a settlement of their claim. The court is agreeable to this suggestion.

CONCLUSION

The court grants plaintiffs' motion for partial summary judgment and denies defendant's motion for summary judgment. The court declares that plaintiffs are not within the § 7(k) exemption and that defendant must pay plaintiffs according to the schedule set out in 29 U.S.C. § 207 (a)(1). The parties should determine whether settlement

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[10] Section 216(b) provides in part:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their . . . unpaid overtime compensation . . . and in an additional equal amount as liquidated damages. . . . The court in such action [as authorized by this provision] shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

29 U.S.C. § 216(b).

is possible. A status conference is set for May 12, 1992, at 9:45 a.m. to determine whether any progress has been made toward settlement.

Dated: Mar. 31, 1992.

ENTER:

/s/ John F. Grady
United States District Judge

[Docketed Jun. 2, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 92 C 3892
Judge Grady

JAMES M. ALEX, *et al.*,
Plaintiffs,

v.

CITY OF CHICAGO, ILLINOIS,
Defendant.

ORDER

Before the Court is the defendant's motion seeking the entry of judgment pursuant to Fed.R.Civ.P. 54(b). The Plaintiffs do not oppose the motion.

In the companion case of *McKittrick, et al., v. City of Chicago,* 90-C-3945, this Court previously issued a decision on March 31, 1992, denying defendant's motion for summary judgment and granting plaintiffs' motion for partial summary judgment as to the First Claim in plaintiffs' Complaint, and finding that the defendant was liable to the plaintiff employees for failure to pay them overtime compensation under the Fair Labor Standards Act, 29 U.S.C. § 207(a), based on the 40-hour workweek standard. The Court has applied that ruling to this action. The parties have reached agreement and filed stipulations settling all the issues pertaining to the damages and relief claimed by the plaintiffs. The main task remaining to be done is the calculation of the damages owed to the individual plaintiffs. If an immediate appeal is permitted

now by the entry of judgment under Rule 54(b), there will not be a second appeal with respect to damages.

A Rule 54(b) certification is particularly appropriate where the parties have stipulated with regard to damages and eliminated the risk of a second appeal, and where the computation of damages is mechanical. *United States v. Ettrick Wood Products,* 916 F.2d 1211, 1218-19 (7th Cir. 1990); *McMunn v. Hertz Equipment Rental Corp.,* 791 F.2d 88, 90 (7th Cir. 1986); *Parks v. Pavkovic,* 753 F.2d 1397, 1401-02 (7th Cir. 1985).

Accordingly, in light of the record in this case and for the reasons stated above, the Court expressly determines that there is no just reason for delay, certifies its March 31, 1992 Order for appeal, and directs entry of final judgment as to the First Claim in plaintiffs' Complaint, pursuant to Rule 54(b), in favor of the plaintiffs.

Dated: Jun. 1, 1993

/s/ John F. Grady
United States District Judge

[Docketed Jun. 2, 1993]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number. 92 C 3892

JAMES M. ALEX *et al.*

v.

CITY OF CHICAGO

JUDGMENT IN A CIVIL CASE

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That pursuant to Rule 54(b), final judgment is entered to the First Claim in plaintiffs' complaint in favor of the plaintiffs and against the defendant.

Date June 1, 1993

H. STUART CUNNINGHAM
Clerk

/s/ [Illegible]
(By) Deputy Clerk

[Docketed Jun. 2, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 90-C-3945
Judge Grady

MICHAEL M. MCKITTRICK *et al.*,
Plaintiffs,

v.

CITY OF CHICAGO, ILLINOIS,
Defendant.

ORDER

Before the Court is the defendant's motion seeking the entry of judgment pursuant to Fed.R.Civ.P. 54(b). The Plaintiffs do not oppose the motion.

The Court previously issued a decision on March 31, 1992 denying defendant's motion for summary judgment and granting plaintiffs' motion for partial summary judgment as to the First Claim in plaintiffs' Complaint, and finding that the defendant was liable to the plaintiff employees for failure to pay them overtime compensation under the Fair Labor Standards Act, 29 U.S.C. § 207(a), based on the 40-hour workweek standard. The parties have reached agreement and filed stipulations settling all the issues pertaining to the damages and relief claimed by the plaintiffs. The main task remaining to be done is the calculation of the damages owed to the individual plaintiffs. If an immediate appeal is permitted now by the entry of judgment under Rule 54(b), there will not be a second appeal with respect to damages.

A Rule 54(b) certification is particularly appropriate where the parties have stipulated with regard to damages and eliminated the risk of a second appeal, and where the computation of damages is mechanical. *United States v. Ettrick Wood Products*, 916 F.2d 1211, 1218-19 (7th Cir. 1990); *McMunn v. Hertz Equipment Rental Corp.*, 791 F.2d 88, 90 (7th Cir. 1986); *Parks v. Pavkovic*, 753 F.2d 1397, 1401-02 (7th Cir. 1985).

Accordingly, in light of the record in this case and for the reasons stated above, the Court determines that there is no just reason for delay, certifies the March 31, 1992 Order for appeal, and directs entry of final judgment as to the First Claim in plaintiffs' Complaint, pursuant to Rule 54(b), in favor of the plaintiffs.

Dated: Jun. 1, 1993

/s/ John F. Grady
United States District Judge

[Docketed Jun. 2, 1993]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 90 C 3945

MICHAEL M. MCKITTRICK *et al.*

v.

CITY OF CHICAGO

JUDGMENT IN A CIVIL CASE

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That pursuant to Rule 54(b), final judgment is entered to the First Claim in plaintiffs' complaint in favor of the plaintiffs and against the defendant.

Date June 1, 1993

H. STUART CUNNINGHAM
Clerk

/s/ [Illegible]
(By) Deputy Clerk

LIST OF PARTIES FOR THE RESPONDENTS

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No. 94-704

Supreme Court, U.S.
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OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

THE CITY OF CHICAGO,
Petitioner,
v.
JAMES M. ALEX, *et al.*,
Respondents,

THE CITY OF CHICAGO,
Petitioner,
v.
MICHAEL M. MCKITTRICK, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

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THE CITY OF CHICAGO,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case arises under the Fair Labor Standards Act [hereinafter "FLSA" or "Act"], and it involves the petitioner's unsuccessful attempt to treat its medical service employees as employees engaged in "fire protection activities" in order to take advantage of a limited overtime exemption under section 7(k) of the Act. 29

U.S.C. § 207(k). The petitioner's primary argument in seeking review by this Court is a claimed conflict among the circuits as to the proper test for determining when public ambulance service employees are subject to the section 7(k) partial overtime exemption. As explained in Part I, *infra*, and contrary to the petitioner's contention, the decision of the Seventh Circuit in this case is not in conflict with the decision of the Eleventh Circuit in *Wouters v. Martin County*, 9 F.3d 924 (11th Cir. 1993). In fact, this Court denied *certiorari* in the *Wouters* case on October 3, 1994 (Docket No. 93-1867), and nothing has changed since that time to warrant further review by this Court.

The respondents are paramedics employed by the petitioner, City of Chicago. They work in the Bureau of Emergency Medical Services of the petitioner's fire department. The paramedics are in a job classification separate from the classification for fire fighters. Candidates for paramedic and fire fighter positions must meet different qualifications for hiring, and are selected from separate eligibility lists.

The paramedics operate ambulances or mobile intensive care units, and their mission is to provide emergency medical care and pre-hospital life support, especially in the more serious medical incidents involving heart attacks, diabetic reactions, etc. The paramedics do not perform any fire protection activities or duties. Specifically, the paramedics are not authorized to engage in, and do not perform, any duties in connection with fire suppression, control, prevention, inspections, or any activities related to the job of fire fighting.

Under applicable policies and orders of the fire department, the paramedics are not authorized to enter burning buildings or smoke laden or contaminated areas. Fire fighters and specialized rescue personnel extricate victims from hazardous situations; the paramedics do not perform those functions. Indeed, paramedics are subject

to discipline if they engage in fire protection or rescue activities. Nevertheless, the City has chosen to treat the paramedics as fire protection employees under the section 7(k) exemption, in order to avoid paying overtime compensation that would otherwise be due.

Section 7(a) of the FLSA generally requires that employees must be paid overtime compensation after working in excess of 40 hours per week. 29 U.S.C. § 207 (a)(1). Congress enacted a narrow exception to this overtime requirement, section 7(k), which provides for a higher hourly overtime standard for employees engaged in "fire protection activities." During the time period relevant to this action, the petitioner invoked the fire fighting employees' exemption and declined to pay the paramedics overtime compensation until they worked in excess of 136 hours in an 18-day work period.[1] Finding that the dispositive facts were not in dispute, on cross-motions for summary judgment the District Court decided that petitioner did not carry its burden of proving compliance with the Labor Department's regulations and letter rulings which govern application of the section 7(k) exemption.

In a decision issued on July 21, 1994, the Court of Appeals for the Seventh Circuit, without dissent, affirmed the District Court's ruling. Applying section 7(k) and the Labor Department's regulations set forth at 29 C.F.R. §§ 553.210 and 553.215, the Seventh Circuit concluded that the paramedics had not received "training in the rescue of fire, crime, and accident victims" as required by the regulations. Accordingly, the court determined that the petitioner was not entitled to avoid the general obligation to pay overtime compensation based on the tradi-

---

[1] Under the Labor Department's regulations, fire protection employees do not receive overtime compensation until hours worked during an applicable work period exceeded a rate of 53 hours per week (up to the maximum level of 212 hours in a work period of 28 days). *See* 29 C.F.R. §§ 553.201(a), 553.230(c).

tional 40-hour work-week standard by treating its paramedics as exempt fire protection employees under section 7(k).

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT

The petitioner's main argument in support of its petition is that the circuits are split as to the proper test for determining when public sector emergency medical service personnel are subject to the partial overtime exemption contained in section 7(k) of the FLSA for employees in "fire protection activities." The petitioner argues that one test is being applied by the Seventh Circuit in the decision below, as well as the Sixth Circuit in *Justice v. Metropolitan Government*, 4 F.3d 1387 (6th Cir. 1993) and the Fifth Circuit in *Bond v. City of Jackson*, 939 F.2d 285 (5th Cir. 1991), while a different test is being applied by the Eleventh Circuit pursuant to its decision in *Wouters v. Martin County*, 9 F.3d 924 (11th Cir. 1993), *cert. denied*, No. 93-1867 (Oct. 3, 1994).

As explained below, however, the Eleventh Circuit did not adopt a contrary test in *Wouters*. In fact, the Eleventh Circuit remanded to the district court the question of the appropriate test to determine when public sector paramedics and emergency medical technicians are subject to the partial overtime exemption provided in section 7(k) of the Act. Thus, there is not a split of authority because the circuit courts that have reached the issue have consistently applied the same test, while the Eleventh Circuit in *Wouters* merely remanded that question for further development and application by the district court in that case.[2]

---

[2] The petitioner also claims that there is a "split" between the decisions of the Fifth, Sixth, and Seventh circuits, on one side, and the decision in *Alexander v. Kansas City*, 1993 U.S. Dist. Lexis 14505 (D. Kan. 1993), on the other. As noted by the district court

The regulatory provisions at issue are 29 C.F.R. §§ 553.210 and 553.215. Section 553.210(a) provides in relevant part:

> [T]he term "any employee . . . in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. . . . The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See § 553.215.[3]

Section 553.215(a) provides in relevant part:

> Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection activities or law enforcement activities

---

in *Alexander*, however, the Tenth Circuit has not addressed the application of section 7(k) to public sector emergency medical service employees. Even assuming, *arguendo*, that the district court decision in *Alexander* may be in conflict with other circuit court decisions, the appropriate venue to address the asserted disparity is the Tenth Circuit. The district court decision in *Alexander* can not create a "conflict" within the meaning of Rule 10.1(a) of the Rules of this Court.

[3] The quotation of 29 C.F.R. § 553.210 contained at page 7 of the City's petition glaringly omits the cross-reference to 29 C.F.R. § 553.215. This omission is significant because that cross-reference to § 553.215 strongly supports the holding by the court below, as well as the decisions by the courts in *Justice* and *Bond*, *supra*.

> of the type contemplated by sections 7(k) and 13(b)(20) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. . . .

In the instant case, the paramedics are employed by the City's fire department within its Bureau of Emergency Medical Services. For that reason, the Seventh Circuit initially focused its inquiry on the language contained in section 553.210. As set forth above, that section provides that the phrase "any employee . . . in fire protection activities" would include "rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. *See § 553.215.*" 29 C.F.R. § 553.210(a) (emphasis added). The petitioner has argued, in essence, that in interpreting section 553.210, courts should ignore the cross-reference to section 553.215, and instead treat the "integral part" language of 29 C.F.R. § 553.210 as a separate test that is substantively different from the more detailed test contained in 29 C.F.R. § 553.215. The Seventh Circuit rejected this argument, stating that:

> We agree with the plaintiffs and the Sixth Circuit in *Justice* that the regulations only state one test for the § 7(k) exempt status of publicly employed emergency medical personnel. . . . The cross-reference to .215 most likely indicates that the fleshed-out formulation of that section is the appropriate test to apply to ambulance personnel from any public agency.

Alex v. Chicago, 29 F.3d 1235 (7th Cir. 1994), Pet. App. 10a-11a. As the court noted, this holding is strongly supported by the relevant regulatory history. When the Department of Labor issued its regulations, it

also addressed certain outside comments that had been made with respect to section 553.210:

> The legislative history of the 1974 FLSA Amendments . . . clearly indicates that only those employees who are engaged in ambulance or rescue service activities which are *substantially related* to fire protection or law enforcement activities can qualify for these exemptions . . . . As discussed above in the analysis of the comments on § 553.210, the Congress clearly intended that only those ambulance and rescue service employees whose activities are substantially related to fire protection or law enforcement activities can qualify for exemption under sections 7(k) or 13(b)(20).

See 52 Fed. Reg. 2022 (January 16, 1987) (emphasis in original); *cited in Alex*, Pet. App. 12a. The Seventh Circuit reasoned that:

> By echoing the locution of .215 in explaining the "integral part" language of .210, the Labor Department has confirmed what the cross-reference "See § 553.215" strongly implies: that the substantial relatedness of the services of a fire department's ambulance personnel to the agency's fire protection activities, as explicated in .215, tests such personnel's eligibility for section 7(k) exemption just as it tests all publicly employed ambulance personnel's eligibility for the exemption. Section 53.210 describes in general terms what § 553.215 expounds in more detail.

Id., Pet. App. 12a-13a.

Thus, the court below reasoned that there is actually only one test to be applied in determining whether ambulance and rescue service employees of a public agency fall within the section 7(k) partial overtime exemption. This conclusion is consistent with the analysis of the Sixth Circuit in *Justice*, 4 F.3d at 1393-95, as well as the holding by the Fifth Circuit in *Bond*, 939 F.2d at

287. Furthermore, these decisions recognize the importance of uniform and fair application of federal law because they assure that similarly situated emergency medical service employees will be treated similarly for overtime purposes under the FLSA, regardless of whether the public employer chooses to place them inside or outside its fire department.

In contrast, the petitioner has offered no alternate explanation as to the meaning of the "integral part" test if it were to be viewed as substantively distinct from the "substantially related" test. Nor has the petitioner offered any rationale why Congress or the Labor Department would have intended to treat similarly situated emergency medical service employees differently for purposes of overtime based on their technical inclusion or exclusion from a public entity's fire department. It is against this background that the petitioner's claim that there is a split among the circuits must be evaluated.

Moreover, when the Eleventh Circuit's decision in *Wouters* is carefully examined on the very point advanced by petitioner here—the interrelation between 29 C.F.R. §§ 553.210 and 553.215—it is clear that no split in authority exists. In *Wouters,* the district court had analyzed the dispute as one involving emergency medical service employees employed by a public agency other than a fire department. Subsequently, the emergency medical service personnel and fire fighters were placed in a single "Emergency Services Division." For that reason, the Eleventh Circuit in *Wouters* directed that, on remand, the district court should examine what effect, if any, this change in structure would have on the outcome of the case.

In analyzing this, the Eleventh Circuit noted that "[n]either regulation [§ 553.210(a) or § 553.211(a)] provides guidance about what constitutes an integral part, nor have we interpreted the precise relationship between the integral part and the substantially related standards." *Wouters,* 9 F.3d at 931-32. However, instead of deciding

that issue on the record before it, the Eleventh Circuit remanded for further consideration by the district court. As stated in its opinion:

> The district court did not engage in a separate integral part inquiry at all. Defendant suggests that the integral part test represents a standard that is distinct and applicable to the present facts. *We leave to the district court to analyze the relationship between the "substantially related" and "integral part" standards and their applicability to the present case.*

Id. at 932 (emphasis added).

Therefore, contrary to the petitioner's mistaken contention, the Eleventh Circuit has *not* held that the "integral part" language in 553.210 requires an analysis that is substantively distinct from the test set forth in section 553.215. Rather than rendering a decision on the meaning and interpretation of 29 C.F.R. § 553.210 where the district court had not examined that provision, the Eleventh Circuit took the appropriate step of remanding the issue for initial determination by the district court. Obviously, such action can not be reasonably construed as creating a conflict among the circuits.

Finally, only a few weeks ago, this Court declined to grant a writ of *certiorari* in *Wouters,* No. 93-1867 (Oct. 3, 1994). Succinctly stated, there is no divergence of authority among the circuits and further review of the test to be applied to public sector emergency medical service personnel is unnecessary.

II. THE CLAIMED IMPACT ON THE PETITIONER OF PAYING OVERTIME COMPENSATION TO ITS PARAMEDICS IS IRRELEVANT

The second reason put forward by the petitioner in seeking *certiorari* is the claim that the question of the proper test to apply to paramedics under 29 C.F.R. § 553.210 is "a matter of great financial and operational importance" to public agencies. Pet. 12-13. The peti-

tioner speculates that public agencies will face "immense financial exposure and organization upheaval" by the application of the regulatory standards endorsed by the Fifth, Sixth, and Seventh Circuits. Pet. 13. Consideration need not be given to such unfounded conjecture because the petitioner's discussion of this point is irrelevant in an FLSA enforcement action.

In determining whether employers have failed to comply with the Act, courts are not required to assess what effect compliance will have on the employer's operations. No balancing test exists in which the statutory right of employees to overtime compensation is weighed against the impact on the structure of the employer's operations. The FLSA's overtime protections are broadly construed, and apply unless an employer proves entitlement to an exemption contained in the Act. *Congress* has already balanced the interests of employees and employers through the establishment of exemptions.

Moreover, simply because the petitioner had adopted a system whereby the paramedics were not paid overtime unless they worked in excess of 136 hours in an 18-day work schedule, does not make that practice acceptable under federal law. As this Court emphasized long ago:

> "The Fair Labor Standards Act was not designed to codify or perpetuate those customs or contracts which allow an employer to claim all of an employee's time while compensating him for only a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights."
>
> Such a conclusion is the only method of achieving the plain design of § 7(a) to spread employment

> through imposing the overtime pay requirement on the employer and to compensate the employee for the burden of a workweek in excess of the hours fixed by the Act.

Jewell Ridge Coal Corp. v. United Mine Workers Local 6167, 325 U.S. 161, 167 (1945) (quoting *Tennessee Coal, Iron and Rail Co. v. Muscoda Local 123*, 321 U.S. 590, 602-03 (1944)). *See also Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 741 (1981).

Congress has spoken clearly on the subject—there is a presumption that employees, including those in the public sector, are entitled to time and one half FLSA overtime compensation for all hours worked in excess of 40 hours in a work week. This presumption is overcome only if the employer can prove that the employees fall within one of the exemptions to the Act. It is no defense to the failure to pay employees FLSA overtime for an employer to claim that its organization is not presently structured to accommodate this obligation.

After benefiting from a system in which the petitioner requires the paramedics to work long hours without paying them overtime unless they work in excess of 136 hours in an 18-day work period, no doubt it may now seem inconvenient to pay these employees for their time and services. Inconvenience or financial hardship do not create an entitlement to the limited overtime exemption contained in section 7(k) of the FLSA.[4] In short, the petitioner's protestations about the effect that paying the paramedics FLSA overtime compensation may have on its current organizational structure and operations are not a proper basis for seeking review in this Court.

---

[4] *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 40 (1944); *see also Torres v. American R. Co.*, 157 F.2d 255, 256 (1st Cir.), *cert. denied*, 329 U.S. 782 (1946) (holding that "the Act does not exempt employers who are in financial difficulties").

III. THE DECISION BELOW DOES NOT IGNORE THE PLAIN LANGUAGE OF THE DEPARTMENT OF LABOR'S REGULATIONS

The third reason offered by petitioner for granting *certiorari* is the argument that the Seventh Circuit's holding "ignores the plain language of the DOL regulations." Pet. 14. As noted above in Point I, that contention is erroneous. Without repeating the discussion, suffice it to note that 29 C.F.R. § 553.210, rather than defining the term "integral part," provides an explicit textual cross-reference to 29 C.F.R. § 553.215, a provision that contains a more detailed criteria to be applied in determining when emergency medical service personnel fall within the narrow overtime exemption contained in section 7(k) of the Act. The Seventh Circuit explained at length the interrelationship of the regulations (Pet. App. 10a-16a), and that cogent analysis is fully supported by the Labor Department's statement when it issued these regulations [*See* 52 Fed. Reg. 1012 *et seq.* (January 16, 1987)]. The clear intent of section 553.210, when read in conjunction with section 553.215—as instructed in the regulation itself—is that public sector emergency medical service employees are subject to the section 7(k) partial overtime exemption only where their duties are *substantailly related* to fire protection or law enforcement activities.

Thus, rather than being in conflict with the plain language of the regulations, the decision of the court below, as well as the holdings by the Sixth Circuit in *Justice* and the Fifth Circuit in *Bond*, are entirely consistent with the Labor Department's regulations on this point. These holdings also further the statutory purpose of providing a uniform standard under which similarly situated emergency medical service employees are to be treated similarly in determining their entitlement to overtime compensation under the FLSA.

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be denied.

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No. 94-704

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

THE CITY OF CHICAGO,
Petitioner,
v.
JAMES M. ALEX, *et al.*,
Respondents.

THE CITY OF CHICAGO,
Petitioner,
v.
MICHAEL M. MCKITTRICK, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION, GOVERNMENT FINANCE OFFICERS ASSOCIATION, AND NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether ambulance and rescue service employees who are employed by an organized fire department fall within the partial exemption from the Fair Labor Standards Act overtime pay requirements, 29 U.S.C. § 207(k), for employees of a public agency engaged in "fire protection activities."

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include municipal, county, and state governments and officials throughout the United States, have a compelling interest in legal issues

that affect state and local governments. This case presents just such an issue. Which overtime pay requirements are applicable to emergency medical service personnel is a question that affects thousands of state and local governments. *Amici*'s members provide emergency medical services in their jurisdictions and have a manifest interest in the cost and the structure of those services. *Amici* accordingly submit this brief to assist the Court in determining whether to grant certiorari.*

ARGUMENT

1. Section 7(k) of the FLSA provides state and local governments a partial exemption from the requirement that employers pay overtime pay at the rate of one and one-half times the regular rate of pay for all hours worked in excess of forty per week for employees in fire protection and law enforcement activities. 29 U.S.C. § 207(k). The Department of Labor ("DOL") has issued regulations explicitly stating that ambulance and rescue service employees can be considered employees in fire protection or law enforcement activities and defining the standards for determining whether they so qualify. See 29 C.F.R. §§ 553.210, 553.211, 553.215 (1993). In recent years, however, ambulance and rescue service employees have been filing lawsuits around the country claiming that they do not fall within the Section 7(k) exemption and that they are entitled to overtime pay for all hours worked in excess of forty hours per week. *See, e.g., Wouters v. Martin County*, 9 F.3d 924 (11th Cir. 1993), cert. denied, 115 S. Ct. 65 (1994); *Justice v. Metropolitan Government*, 4 F.3d 1387 (6th Cir. 1993); *Bond v. City of Jackson*, 939 F.2d 285 (5th Cir. 1991); *Alexander v. Kansas City*, 1993 WL 393013 (D. Kan. Sept. 23, 1993); *Burgess v. Catawba County*, 805 F. Supp. 341 (W.D. N.C. 1992); *Nalley v. Mayor and City Council of Baltimore*, 796 F. Supp. 194 (D. Md. 1992); *Little-*

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* The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent, pursuant to Rule 37 of the Rules of this Court, have been filed with the Clerk of the Court.

field v. Town of Old Orchard Beach, 780 F. Supp. 64 (D. Me. 1992). Many of the courts that have considered the issue have interpreted the DOL regulations very narrowly, thus excluding all or almost all ambulance and rescue service employees of state and local governments from the Section 7(k) partial exemption to general FLSA overtime requirements.

This crabbed construction is contrary to what DOL intended. It also has dire financial and operational consequences for state and local governments nationwide. Like firefighters and police officers, emergency medical service personnel are needed to cover medical emergencies that occur at all hours of the day and night. Organizing emergency medical service employees so that they work only forty hours per week will be costly, disruptive, and intrusive. Many governments will have to hire, train, and pay additional employees to do so. Alternatively, governments will have to pay their emergency medical service employees more in the future. Either choice will be costly. And either way, governments will face the possibility of huge back pay awards to those emergency medical service employees whom they have been treating as employees in fire protection or law enforcement activities in reliance on the DOL regulations. The cost and risk of litigation is pressuring governments to restructure their emergency services now, even in those circuits where there is no binding ruling. In short, this issue has done all the percolating that state and local governments can afford. This Court should grant certiorari to relieve state and local governments from this pressure—and the costs of restructuring and back pay—at a time when governments are already financially pressed.

2. As the Seventh Circuit explained, Pet. App. 10a, the question presented in this case has divided the circuits. The issue simply, is whether Sections 553.210 and 553.211 of the DOL regulations state a distinct test applicable to ambulance and rescue service employees who are employed by an organized fire or police department, or whether the test applicable to them is the one set out in

Section 553.215 of the regulations. This difference is important because Sections 553.210 and 553.211 allow employees who are an integral part of the agency's fire protection or law enforcement activities to fall within the exemption, whereas Section 553.215 requires that the work of employees be substantially related to fire fighting or law enforcement. Sections 553.210 and 553.211 explicitly apply to employees employed by an organized fire or police department, and use an "integral part" standard. On this basis, two courts have rejected application of the test under Section 553.215 to employees of a fire or police department. See *Wouters*, 9 F.3d at 931 ("integral part test presents an inquiry distinct from the substantially related standard"); *Alexander v. Kansas City*, 1993 WL 393013, at *6 (D. Kan. Sept. 23, 1993) ("integral part means something other than apply the two-part test of § 553.215 that is cross-referenced in § 553.210"). At least two courts, however, including the court below, concluded that DOL regulations state only one test that applies to all publicly employed paramedics. See Pet. App. 10a; *Justice v. Metropolitan Government*, 4 F.3d 1387, 1395 (6th Cir. 1993). This Court should resolve this conflict.

3. The Seventh Circuit's decision is also incorrect. The court below reached the conclusion that the "substantially related" test set out in Section 553.215 of the DOL regulations applies to all ambulance and rescue service employees of any public agency only by ignoring the plain language of that section. Section 553.215 states in the clearest language that it applies to "[a]mbulance and rescue service employees of a public agency other than a fire protection or law enforcement agency." 29 C.F.R. § 553.215. Rather than adhere to this language, the court below put great weight on a simple cross reference to Section 553.215 that appears at the end of Sections 553.210 and 553.211 of the regulations. On the basis of this bare cross reference, the court applied the Section 553.215 test for ambulance and rescue service employees of a public agency other than a fire protection or law en-

forcement agency to ambulance and rescue service employees who are employees of fire protection or law enforcement agencies.

Under the Seventh Circuit's construction of the regulations, parts of three sections become completely superfluous. The "integral part" language of Sections 553.210 and 553.211 applies to no one and has no meaning. And the language in Section 553.215 that says that the section applies to employees of public agencies other than fire protection and law enforcement agencies becomes mere surplusage. Indeed, the language in these three regulations that becomes the most meaningful is the bare statement "[s]ee § 553.215" that appears at the end of Sections 553.210 and 553.211. This construction makes no sense. DOL drafted language that has a plain meaning. The regulations should not be interpreted to make that language superfluous.

The City of Chicago also correctly points out in its petition that DOL regulations set out three categories of ambulance and rescue service employees in an ascending order of what the employer must show—from the easiest showing to the hardest—before its employees fall within the Section 7(k) exemption. If the employees are employed within an organized fire or police department, the employer need only show that they are an "integral part" of the department's fire protection or law enforcement activities. 29 C.F.R. §§ 553.210, 553.211. If the employees are employed by a public agency other than an organized fire or police department, the employer must show that their services are "substantially related to firefighting or law enforcement activities." 29 C.F.R. § 553.215(a). Finally, if the employees are employed by a private agency, the employer can never show they are within the Section 7(k) exemption "even if their activities are substantially related to the fire protection or law enforcement activities performed by a public agency or their employer is under contract with a public agency to provide such services." 29 C.F.R. § 553.215(c). This was a completely logical approach for the regulations. It should be easier for a

public employer to treat its ambulance and rescue service employees as employees in fire protection or law enforcement activities when they work along side firefighters or police officers in fire departments or police departments. In such circumstances, there is virtually no chance that the organizational structure is pretextual; thus there is no reason for a test that is difficult to satisfy. Indeed, there is every reason to think that ambulance and rescue service employees actually in fire and police departments should be every bit as exempt under Section 7(k) as firefighters and police officers themselves. The court below thus erred when it interpreted the regulations to mean that paramedics employed by a fire department had to meet the same test that the regulations apply for paramedics who are not employed by a fire or police department.

4. The disarray in the lower courts on the question presented in this case has not been aided by the failure of DOL to speak to that question. Although the lower courts have reached conflicting conclusions, DOL has studiously refrained from bringing or intervening in litigation on this point, or otherwise clearly articulating its position on this critical issue. Accordingly, the need for guidance from this Court (or, at the minimum, the need for the views of the Solicitor General on this important question) is all the greater.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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